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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Lassen)**

THE PEOPLE,

Plaintiff and Respondent,

v.

D'ARSEY LAWRENCE BOLTON,

Defendant and Appellant.

C060005

(Super. Ct. No. CH024891)

After defendant D'Arsey Lawrence Bolton admitted 11 prior serious felony convictions, a jury convicted him of possession of a sharp instrument while in prison. (Pen. Code, § 4502, subd. (a).)¹ The trial court sentenced him to a state prison term of 25 years to life.

On appeal, defendant contends: (1) the trial court failed to properly advise him of his constitutional rights before accepting his admission of prior convictions; (2) there was insufficient evidence to support the verdict; (3) the court erred in denying his motion to prevent the use of leg shackles;

¹ Undesignated statutory references are to the Penal Code.

(4) two evidentiary rulings were erroneous; and (5) the cumulative effect of the errors require reversal of the judgment.

We conclude that the trial court failed to give proper advisements to defendant before accepting his admission of prior convictions, but that none of his other contentions has merit. We shall reverse and remand the matter for further proceedings and resentencing, if necessary. In all other aspects, we shall affirm.

FACTUAL BACKGROUND

On June 6, 2007, Johnathan Neves was on duty as a correctional officer at the High Desert State Prison in Lassen County. At approximately 11:30 a.m., Neves conducted a search of cell 131, which was occupied by defendant and Lamar Temple. Defendant was assigned to the top bunk, while Temple was assigned to the bottom bunk. During the search, Neves recovered from the top bunk a clear plastic bag containing over 30 "Top Ramen" dried noodle soup packets and several loose individual soup packets nearby. He placed all the packets into the clear plastic bag and placed it into a second bag marked with defendant's name, inmate number, and cell number. After removing the mattress and pillow from the top bunk, Neves sent all the items to the Investigative Services Unit, where they were X-rayed by Officer Gregory Brackett.

While viewing the items through an X-ray machine, Officer Brackett noticed a metal object in the clear plastic bag

containing the soup packets. Upon opening the bag, Brackett removed a few soup packets, and noticed a sharpened metal object protruding from one of the packets. He removed the bag from the X-ray machine and notified Officer Bobby Wheeler of his discovery.

Officer Wheeler removed the object from a chicken mushroom-flavored soup packet. It was a black metal object with a sharpened blade and what appeared to be white cloth wrapped around one end.

Officer Wheeler then contacted defendant. He asked him if he knew why he was being interviewed. Defendant responded that it was probably because of the weapon found in his soups. He accurately described the weapon as consisting of black metal with silver edges and six to seven inches long, about one-half inch wide, with a piece of torn white sheet wrapped around the handle. He stated that it was in a chicken mushroom soup packet and asserted that he needed it for self-protection.

Defense

At trial, inmate Temple testified on defendant's behalf. Despite not "recall[ing] if [he] ever had a cellmate named Bolton," Temple claimed that "all the soups in that cell" belonged to him. He admitted possessing a black metal weapon that was located in one of the beef-flavored soup packets.

Officer Richard Pribble, the "Initial Investigator" of the incident, was called to the stand and asked about inconsistencies in his report of the incident. Pribble admitted

that his report erroneously stated that Officer Brackett told him the weapon was discovered "during an X-ray scan of inmate Bolton's mattress." (Italics added.) The report also erroneously stated that Wheeler "took possession of the weapon from him and put the mattress into evidence."

Officer Pribble explained these discrepancies by stating that his word processor was "corrupting files" and suggested the confusion stemmed from a prior incident where a weapon was, in fact, found in the mattress of one of defendant's former cellmates.

PROCEDURAL HISTORY

Defendant was charged with possession of a sharp instrument while in prison (§ 4502, subd. (a)) and admitted 11 prior serious felony convictions under the three strikes law (§ 667, subds. (b)-(i)). The jury found him guilty of the charged offense. The trial court sentenced him to 25 years to life in state prison, consecutive to the prison term he was already serving.

DISCUSSION

I. *Boykin-Tahl*² Error

Defendant contends that the trial court failed to properly advise him and elicit a waiver of his constitutional rights

² *Boykin v. Alabama* (1969) 395 U.S. 238, 243-244 [23 L.Ed.2d 274, 279-280] (*Boykin*); *In re Tahl* (1969) 1 Cal.3d 122, 133 (*Tahl*).

before accepting his admission of 11 prior felony convictions, which were later used to sentence him under the three strikes law. We agree.

At a hearing on pretrial motions, defense counsel initially stated that he was "stipulating to non-bifurcation" of the prior serious or violent felonies. However, after the trial court ruled that the prosecutor could use evidence of the priors as part of his case-in-chief, defense counsel stated that defendant was prepared to admit the priors. The following dialogue occurred regarding defendant's priors:

"THE COURT: . . . Mr. Bolton, it is alleged as follows in this matter: That you have certain prior convictions. All of them appear to be out of Contra Costa County Superior Court. I'm going to read those to you and ask if these allegations occurred. If you did not admit them, then it would be up to the People to submit to me or to the jury the abstract showing those convictions. These all arise out of one case, [No.] 945-2.^[3] They all have the same date, May 13, 1994 [¶] . . . [¶]

"The[s]e [are] . . . section 288, subdivision (b); . . . section 288, subdivision (b); section 261, subdivision (a); section 261, subdivision (a); section 261, subdivision (a); section 261, subdivision (a);

³ It is unclear whether case No. "945-2" is the correct number. The case number given in the first amended information and elsewhere in the record for each of the eleven May 13, 1994 Contra Costa County Superior Court prior convictions is No. 940515-0.

. . . section 220; . . . section 245, subdivision (a)(1); . . . section 289, subdivision (a); and . . . section 289, subdivision (a). All of those [are] out of Superior Court of Contra Costa County on that date. Do you acknowledge and admit those convictions occurred?

"[DEFENSE COUNSEL]: Your Honor, before he answers, for these reasons I have consulted with my client regarding that. I've advised him for strategic reasons it probably would be better to admit it now rather than submit to the jury.

"[DEFENDANT]: I admit.

"THE COURT: You admit every one of those prior convictions?

"[DEFENDANT]: Yes.

"THE COURT: Thank you. I appreciate that."

There was no further discussion or admonition regarding defendant's admission of the 11 priors.

Under the *Boykin-Tahl-Yurko* rule, before accepting a criminal defendant's admission of a prior conviction, the trial court *must* advise the defendant and obtain waivers of (1) the right to a trial to determine the fact of the prior conviction, (2) the right to remain silent, and (3) the right to confront adverse witnesses. (*In re Yurko* (1974) 10 Cal.3d 857, 863 & fn. 5 (*Yurko*), citing *Boykin, supra*, 395 U.S. at pp. 243-244 [23 L.Ed.2d at pp. 279-280]; *Tahl, supra*, 1 Cal.3d at p. 133.) "Proper advisement and waivers of these rights in the record

establish a defendant's voluntary and intelligent admission of the prior conviction." (*People v. Mosby* (2004) 33 Cal.4th 353, 356 (*Mosby*).) The trial court should also tell the defendant "the effect which a determination of habitual criminality will have on the punishment and other sanctions to be imposed upon the accused's conviction of the substantive crime charged." (*Yurko, supra*, 10 Cal.3d at p. 864.)

However, a defective *Boykin-Tahl* advisement does not require automatic reversal. (*Mosby, supra*, 33 Cal.4th at pp. 360-361.) When a defendant does not expressly waive all of his rights, a reviewing court must examine "whether 'the record affirmatively shows that [the admission] is voluntary and intelligent under the *totality of the circumstances*.'" (*Id.* at p. 360, italics added by *Mosby*, quoting *People v. Howard* (1992) 1 Cal.4th 1132, 1175.) "The focus is not whether [an allegation of] a prior [conviction] would have been found true, but on whether the defendant knew of his constitutional rights." (*People v. Stills* (1994) 29 Cal.App.4th 1766, 1770, citing *Howard, supra*, 1 Cal.4th at p. 1180.)

Mosby and its progeny draw a distinction between "truly silent-record cases" and "incomplete *Boykin-Tahl* advisements." (*Mosby, supra*, 33 Cal.4th at pp. 361-364.) "Truly silent-record cases are those that show no express advisement or waiver of the *Boykin-Tahl* rights before a defendant's admission of a prior conviction. [Citations.] [¶] . . . [¶] . . . These defendants were not told on the record of their right to trial

to determine the truth of a prior conviction allegation. Nor did they expressly waive their right to trial." (*Mosby*, at pp. 361-362.) By contrast, incomplete advisements are "those in which the defendants had been advised of their right to a jury trial, but not of the other two constitutional rights." (*People v. Christian* (2005) 125 Cal.App.4th 688, 695 (*Christian*), citing *Mosby*, *supra*, 33 Cal.4th at pp. 362-364.)

Here, at no point did the trial court give an express admonition regarding defendant's constitutional rights or elicit a waiver of those rights before accepting his admissions. Thus, this is a true "silent-record" case. (*Mosby*, *supra*, 33 Cal.4th at pp. 361-362.) "In such cases, in which the defendant was not advised of the right to have a trial on an alleged prior conviction, we cannot infer that in admitting the prior the defendant has knowingly and intelligently waived that right as well as the associated rights to silence and confrontation of witnesses." (*Id.* at p. 362.) Since, on this record, we cannot infer that defendant knowingly, intelligently, and voluntarily waived his constitutional rights before admitting the prior convictions, we must reverse the trial court's true findings on the priors. (See *Christian*, *supra*, 125 Cal.App.4th at pp. 697-698.)

II. Substantial Evidence

Defendant asserts that the evidence was insufficient to support the jury's verdict that he was guilty of possessing a sharp instrument while in prison. He argues there was

"significant doubt" as to the exact location where the weapon was found and, thus, the prosecution "totally failed to prove that [defendant] rather than Mr. Temple was in possession and control of that weapon."

The standard of appellate review is well settled. We must "review the whole record in the light most favorable to the judgment below . . . --that is, evidence which is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 577, 578.) We do not reweigh conflicting evidence or evaluate the credibility of witnesses. "'[I]t is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts.'" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Simply put, an appellate court must accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded otherwise. (See *People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

Here, substantial evidence supports the jury's finding that defendant possessed the sharp instrument found in the soup packets. Officer Neves testified that the soup packet containing the weapon was recovered from defendant's top bunk. More importantly, defendant admitted to possessing the weapon, accurately described it, and correctly pointed out that it was

hidden in a chicken mushroom soup packet.⁴ This testimony provides plentiful evidence to support the jury's finding of guilt.

While the jury was entitled to reach a different verdict had it believed inmate Temple and discounted the officers' testimony, we have no power to disturb the jury's resolution of conflicting testimony. "'Questions as to the credibility of witnesses and the weight to be given their testimony are for the trier of the facts. " . . . [A]lthough impeaching evidence in the nature of contradictions or otherwise has been received, it is still the right as well as the duty of the jury to determine to what extent they believe or disbelieve the testimony.'" (People v. Cannon (1947) 77 Cal.App.2d 678, 688.)

III. Leg Shackles

Defendant claims the court erred in denying his motion to prevent the use of leg shackles during trial.

The record shows that defense counsel brought a motion in limine requesting that defendant not be shackled during trial because it would interfere with his client's right to counsel and prejudice the jury. The prosecutor replied that defendant's "assaultive behavior" justified the need for leg braces and that steps could be taken to ensure that the restraints were not visible to the jury. After hearing both arguments, the trial

⁴ In contrast, inmate Temple incorrectly asserted that the weapon was located in a beef-flavored soup packet.

court determined that leg braces were appropriate, given the officers' safety concerns.

"[A] defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints." (*People v. Duran* (1976) 16 Cal.3d 282, 290-291.) ""Manifest need" arises only upon a showing of unruliness, an announced intention to escape, or "[e]vidence of any nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained"" (*People v. Hill* (1998) 17 Cal.4th 800, 841, italics added.) "[I]n any case where physical restraints are used[,], those restraints should be as unobtrusive as possible, although as effective as necessary under the circumstances." (*Duran, supra*, 16 Cal.3d at p. 291.) A court's decision to place a defendant in physical restraints will not be overturned absent "a showing of a manifest abuse of discretion." (*Id.* at p. 293, fn. 12.)

The trial court did not abuse its discretion in denying defendant's motion. Defendant had a history of violent behavior. At the time of trial, he was already serving time for 11 prior serious or violent felonies. He also sustained several disciplinary violations involving assaultive behavior, including two incidents of battery on an inmate in 1997, inciting a disturbance in 1999, advancing towards staff in 1999, and combat

with an inmate in 2007. In sum, defendant's concession that he "had behaved badly while in prison" is an understatement.

The trial court also took steps to ensure that the restraints were as unobtrusive as possible. The leg braces were not visible to the jury. Additionally, the courtroom windows were covered and the parties were ordered to switch tables to ensure that the jury did not see the restraints during the trial or while defendant entered and exited the courtroom. For all these reasons, the trial court acted within its discretion in denying defendant's motion.

IV. Evidentiary Rulings

A. Officer Pribble's Testimony

Defense counsel called Officer Pribble to testify about a report he prepared, which stated that Officer Brackett reported the weapon was found in defendant's mattress, rather than in a soup packet, as Officer Wheeler had testified. Pribble explained that the word processor his clerk was using at the time "was corrupting files."

In cross-examination, the prosecutor asked Officer Pribble if there was a prior case involving defendant and a mattress. Defense counsel immediately lodged an objection under Evidence Code section 352 and the trial court conducted a hearing outside the presence of the jury.

At a sidebar hearing, the prosecutor asserted there was another case involving defendant's cellmate and a mattress and that the incident may help explain how the two cases may have

gotten mixed up. The trial court ruled that since defense counsel had "opened the door" by questioning Officer Pribble about the discrepancy in his report, the proffered testimony could be used as a "reasonable explanation of how this mattress mistake" got into the report. However, the court decided to give the jury a limiting instruction, telling it that the prior incident "ha[d] nothing to do with [defendant]" and "was brought forth to you by [the district attorney] . . . to explain how those files got mixed up, how the word mattress came up instead of in a soup can [*sic*]."

Defendant maintains that the trial court abused its discretion in allowing testimony regarding the prior incident involving one of his cellmates. He asserts that the testimony lacked foundation and was speculative. We need not reach the merits of this argument, because "even if we were to assume the trial court erred in allowing the prosecution to introduce such evidence, any error could not have been prejudicial under the applicable standard." (*People v. Whitson* (1998) 17 Cal.4th 229, 251, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.)

"'No judgment shall be set aside, or new trial granted, in any cause, on the ground of . . . the improper admission or rejection of evidence . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' [Citations.] '[A] "miscarriage of justice" should be declared only when the court . . . is of the

"opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" (*People v. Callahan* (1999)

74 Cal.App.4th 356, 363; see Evid. Code, § 353, subd. (b).)

The testimony was a collateral and inconsequential part of the prosecution's case. Its only purpose was to rehabilitate Officer Pribble, in light of an embarrassing mistake in his report.

However, Officer Pribble's report was itself nothing more than a sideshow. Pribble was not a percipient witness to the discovery of the metal instrument, but was merely reporting what others had told him. The testimony of the percipient witnesses, Officers Wheeler, Brackett and Neves, established that the sharpened instrument was found in defendant's top bunk and that defendant admitted to possessing it immediately upon being questioned. We therefore have no hesitation in concluding it is not reasonably probable defendant would have achieved a better result had the court precluded Pribble from testifying about the second mattress incident.

B. Officer Wheeler's Rebuttal Testimony

Defendant contends that the trial court abused its discretion in allowing the prosecutor to question Officer Wheeler on rebuttal because it was used merely to "reaffirm[] his earlier testimony regarding whether he interviewed [defendant]." This claim is meritless.

On rebuttal, the prosecutor asked Officer Wheeler if he was "absolutely certain [he] interviewed . . . defendant." Defense counsel objected, arguing that Wheeler could not be called to merely reaffirm his prior testimony. The trial court ruled that the prosecutor was entitled to ask Wheeler whether the defense testimony had changed his opinion of his interview with defendant.

Trial court rulings on the admission of rebuttal evidence are reviewed for abuse of discretion. (*People v. Ayala* (2000) 23 Cal.4th 225, 282.) Here, the trial court simply allowed the prosecutor to ask Officer Wheeler if anything presented in the defense's case would cause him to change his prior testimony. "Numerous cases have approved the introduction of rebuttal evidence where, as in the case at bench, rebuttal testimony repeats or fortifies a part of the prosecution's [case-in-chief] which has been attacked by defense evidence." (*People v. Graham* (1978) 83 Cal.App.3d 736, 741, disapproved on a different ground in *People v. Guivan* (1998) 18 Cal.4th 558, 569.)

In any event, allowing Officer Wheeler briefly to reiterate his earlier testimony could not possibly have influenced the jury's verdict. Thus, any evidentiary error was surely harmless.

V. Cumulative Error

Defendant claims his conviction must be reversed because of the cumulative effect of the alleged trial errors discussed

above. Since none of his assertions of trial error has merit, this contention also fails.

DISPOSITION

Defendant's conviction on possession of a sharp instrument while in prison (§ 4502, subd. (a)) is affirmed. The trial court's true findings on the prior felony convictions are reversed and the sentence is vacated. The matter is remanded for further proceedings on the prior conviction allegations, and for resentencing, if necessary. In all other aspects, the judgment is affirmed.

BUTZ, J.

We concur:

HULL, Acting P. J.

ROBIE, J.